

AMENDED IN SENATE JUNE 14, 2016

AMENDED IN ASSEMBLY APRIL 26, 2016

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

## ASSEMBLY BILL

**No. 2316**

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**Introduced by Assembly Member O'Donnell  
(Coauthor: Assembly Member Mullin)**

February 18, 2016

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An act to amend Sections 17400 and 17406 of the Education Code, relating to school facilities.

### LEGISLATIVE COUNSEL'S DIGEST

AB 2316, as amended, O'Donnell. School facilities: leasing property.

Existing law requires the governing board of a school district to adopt a resolution that, among other things: (1) declares its intention to enter into a lease or agreement relating to school property, (2) includes specified information about the property, and (3) fixes a time for a public meeting of the governing board *of the school district* at which sealed proposals to enter a lease or agreement with the school district will be received from any person, firm, or corporation, and considered by the governing ~~board~~, *board of the school district*, as specified.

Existing law, notwithstanding the provision described above, also authorizes the governing board of a school district, without advertising for bids, to lease real property for a minimum rental of \$1 per year if the instrument by which this property is leased requires the lessee to construct, or provide for the construction of, a building to be used by the school district and provides that the title to the building shall vest in the school district at the end of the lease.

~~This bill would, among other things, would delete the language that provides that a school district~~ *the governing board of a school district* ~~is not required to advertise for bids pursuant to this provision and would specify that only a person, firm, or corporation that is a licensed contractor, as specified, is eligible to be the lessee.~~ *provision.* The bill would require an instrument created pursuant to these provisions to be awarded based on a competitive solicitation process to the proposer providing the best ~~value~~ *value, as defined,* to the school district, ~~taking into consideration the proposer's demonstrated competence and professional qualifications necessary for the satisfactory performance of the services required. Before awarding such an instrument, the district.~~ *The* bill would require the governing board of the school district to adopt and publish required procedures and guidelines for evaluating the qualifications of ~~proposers to ensure that the best value selections by the school district are conducted in a fair and impartial manner,~~ *proposers,* as provided. ~~Notwithstanding certain laws, the~~ *The* bill would authorize a school district to enter into such an instrument before written approval ~~by is obtained from the Department of General Services' Division of the State Architect (DSA) if the instrument provides that no work for which a contractor is required to be licensed and for which DSA approval is required shall be performed before receipt of the required DSA approval. The bill would also provide that when a project for the construction, alteration, repair, or improvement of any structure, building, or other improvement of any kind that was~~ *make the bill's provisions retroactively applicable to certain projects* leased through ~~such an an instrument before July 1, 2015, and would specify that if the instrument is later determined to be invalid, the contractor who entered into the contract with the school district shall be entitled to be paid the reasonable cost of the labor, equipment, materials, and services furnished by the contractor before the date of the determination, subject to specified conditions.~~ *The bill would authorize a school district to identify specific types of subcontractors required to be included in a proposal, and would impose specified other procedural requirements on awarding construction subcontracts of a certain value.* The bill would provide that the changes made by its provisions, except the deletion of the ~~school district governing board's board of a school district's~~ authority to not advertise for bids, shall ~~remain in effect only until~~ *become inoperative on July 1, 2022.*

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. Section 17400 of the Education Code is amended to read:

17400. (a) Any school district may enter into leases and agreements relating to real property and buildings to be used by the school district pursuant to this article.

(b) As used in this article, the following terms have the following meanings:

(1) “Best value” means a competitive procurement process whereby the selected proposer is selected on the basis of objective criteria for evaluating the qualifications of proposers with the resulting selection representing the best combination of price and qualifications.

(2) “Best value score” means the total score awarded to a proposer for all scored evaluation factors.

(3) “Building” includes each of the following:

(A) One or more buildings located or to be located on one or more sites.

(B) The remodeling of any building located on a site to be leased pursuant to this article.

(C) Onsite and offsite facilities, utilities, or improvements that the governing board of *the school district* determines are necessary for the proper operation or function of the school facilities to be leased.

(D) The permanent improvement of school grounds.

(4) “Preconstruction services” means advice during the design phase including, but not limited to, scheduling, pricing, and phasing to assist the school district to design a more constructible project.

(5) “Site” includes one or more sites, and also may include any building or buildings located or to be located on a site.

SEC. 2. Section 17406 of the Education Code, as amended by Section 1 of Chapter 214 of the Statutes of 2015, is amended to read:

17406. (a) (1) Notwithstanding Section 17417, the governing board of a school district may let, for a minimum rental of one dollar (\$1) a year, to a person, firm, or ~~corporation, licensed pursuant to Article 5 (commencing with Section 7065) of Chapter 9 of Division 3 of the Business and Professions Code,~~ *corporation* real property that belongs to the school district if the instrument

1 by which this property is let requires the lessee therein to construct  
2 on the demised premises, or provide for the construction thereon  
3 of, a building or buildings for the use of the school district during  
4 the term of the lease, and provides that title to that building shall  
5 vest in the school district at the expiration of that term. The  
6 instrument may provide for the means or methods by which that  
7 title shall vest in the school district before the expiration of that  
8 term, and shall contain other terms and conditions as the governing  
9 board of the school district may deem to be in the best interest of  
10 the school district.

11 (2) An instrument created pursuant to paragraph (1) shall be  
12 awarded based on a competitive solicitation process to the proposer  
13 providing the best value to the school district, taking into  
14 consideration the proposer's demonstrated competence and  
15 professional qualifications necessary for the satisfactory  
16 performance of the services required. Before awarding an  
17 instrument pursuant to this section, the governing board of the  
18 school district shall adopt and publish required procedures and  
19 guidelines for evaluating the qualifications of proposers that ensure  
20 the best value selections by the school district are conducted in a  
21 fair and impartial manner. These procedures and guidelines shall  
22 be mandatory for the school district when awarding an instrument  
23 pursuant to this section. The required procedures shall include, at  
24 a minimum, the following:

25 (A) The school district shall prepare a request for sealed  
26 proposals from qualified proposers. The school district shall include  
27 in the request for sealed proposals an estimate of price of the  
28 project, a clear, precise description of any preconstruction services  
29 that may be required and the facilities to be constructed, the key  
30 elements of the instrument to be awarded, a description of the  
31 format that proposals shall follow and the elements they shall  
32 contain, the standards the school district will use in evaluating  
33 proposals, the date on which proposals are due, *and* the timetable  
34 the school district will follow in reviewing and evaluating  
35 proposals, ~~and the process to be used by the successful proposer~~  
36 ~~for the award of subcontracts.~~ *proposals.*

37 (B) The school district shall give notice of the request for sealed  
38 proposals in the manner of notice provided in Section 20112 of  
39 the Public Contract Code, ~~Code~~ *and in a trade paper of general*  
40 *circulation published in the county where the project is located,*

1 with the latest notice published at least 10 days before the date for  
2 receipt of the proposals.

3 (C) A proposer ~~must~~ *shall* be prequalified in accordance with  
4 subdivisions (b) to (m), inclusive, of Section 20111.6 of the Public  
5 Contract ~~Code~~, *Code* in order to submit a proposal. If used,  
6 electrical, mechanical, and plumbing subcontractors shall be subject  
7 to the same prequalification requirements for prospective bidders  
8 described in subdivisions (b) to (m), inclusive, of Section 20111.6  
9 of the Public Contract Code, including the requirement for the  
10 completion and submission of a standardized prequalification  
11 questionnaire and financial statement that is verified under oath  
12 and is not a public record. These prequalification requirements  
13 shall be included in an instrument created pursuant to paragraph  
14 (1).

15 (D) The request for sealed proposals shall identify all criteria  
16 that the school district will consider in evaluating the proposals  
17 and qualifications of the proposers, including relevant experience,  
18 safety record, price proposal, and other factors specified by the  
19 school district. The price proposal shall include, at the school  
20 district's discretion, either a lump-sum price for the instrument to  
21 be awarded or the proposer's proposed fee to perform the services  
22 requested, including the proposer's proposed fee to perform  
23 preconstruction services or any other work related to the facilities  
24 to be constructed, as requested by the school district. The request  
25 for proposals shall specify whether each criterion will be evaluated  
26 pass-fail or will be scored as part of the best value score, and  
27 whether proposers must achieve any minimum qualification score  
28 for award of the instrument under this section.

29 (E) For each scored criterion, the school district shall identify  
30 the methodology and rating or weighting system that will be used  
31 by the school district in evaluating the criterion, including the  
32 weight assigned to the criterion and any minimum acceptable score.

33 (F) Proposals shall be evaluated and the instrument awarded  
34 under this section in the following manner:

35 (i) All proposals received shall be reviewed to determine those  
36 that meet the format requirements and the standards specified in  
37 the request for sealed proposals.

38 (ii) The school district shall evaluate the qualifications of the  
39 proposers based solely upon the criteria and evaluation  
40 methodology set forth in the request for sealed proposals, and shall

1 assign a best value score to each proposal. Once the evaluation is  
2 complete, all responsive ~~proposers~~ *proposals* shall be ranked from  
3 ~~the most advantageous~~ *highest best value* to the ~~least advantageous~~  
4 *lowest best value* to the school district.

5 (iii) The award of the instrument shall be made by the governing  
6 board of the school district to the responsive proposer whose  
7 proposal is determined, in writing by the governing board of the  
8 school district, to be the best value to the school district.

9 (iv) If the selected proposer refuses or fails to execute the  
10 tendered instrument, the governing board of the school district  
11 may award the instrument to the proposer with the second highest  
12 best value score if the governing board of the school district deems  
13 it to be for the best interest of the school district. If the second  
14 selected proposer refuses or fails to execute the tendered  
15 instrument, the governing board of the school district may award  
16 the instrument to the proposer with the third highest best value  
17 score if the governing board of the school district deems it to be  
18 for the best interest of the school district.

19 (v) Notwithstanding any other law, upon issuance of a contract  
20 award, the school district shall publicly announce its award,  
21 identifying the entity to which the award is made, along with a  
22 statement regarding the basis of the award. The statement regarding  
23 the school district's contract award and the contract file shall  
24 provide sufficient information to satisfy an external audit.

25 (G) The governing board of the school district, at its discretion,  
26 may reject all proposals and request new proposals.

27 (3) Following the award of an instrument created pursuant to  
28 paragraph (1), and if the price proposal is ~~a not a lump sum~~ for the  
29 instrument awarded, the successful proposer shall provide the  
30 school district with objectively verifiable information of its costs  
31 to perform the services requested under the instrument and shall  
32 select subcontractors ~~using a competitive selection process that is~~  
33 ~~set forth in the request for sealed proposals. as set forth in~~  
34 *paragraph (4)*. Once any preconstruction services are completed  
35 and subcontractors are selected, the successful proposer and the  
36 school district shall finalize the price for the services to be provided  
37 under the instrument ~~that is consistent with~~ *does not exceed* the  
38 price estimate in the request for proposal. The contract file shall  
39 include documentation sufficient to support the final price  
40 determination.

1     (4) (A) *The school district, in the request for sealed proposals,*  
2 *may identify specific types of subcontractors that must be included*  
3 *in the proposal. All subcontractors that are identified in the*  
4 *proposal shall be afforded the protections of the Subletting and*  
5 *Subcontracting Fair Practices Act (Chapter 4 (commencing with*  
6 *Section 4100) of Part 1 of Division 2 of the Public Contract Code).*

7     (B) *Following the award of an instrument created pursuant to*  
8 *paragraph (1) and for subcontractors not identified in the proposal,*  
9 *the successful proposer shall proceed as follows in awarding*  
10 *construction subcontracts with a value exceeding one-half of 1*  
11 *percent of the price allocable to construction work:*

12     (i) *Provide public notice of availability of work to be*  
13 *subcontracted in accordance with the publication requirements*  
14 *applicable to the competitive bidding process of the school district,*  
15 *including a fixed date and time on which qualifications statements,*  
16 *bids, or proposals will be due.*

17     (ii) *Establish reasonable qualification criteria and standards.*

18     (iii) *Award the subcontract either on a best value basis or to*  
19 *the lowest responsible bidder. The process may include*  
20 *prequalification or short-listing. The process does not apply to*  
21 *subcontractors listed in the original proposal. Subcontractors*  
22 *awarded construction subcontracts under this subdivision shall*  
23 *be afforded all the protections of the Subletting and Subcontracting*  
24 *Fair Practices Act (Chapter 4 (commencing with Section 4100)*  
25 *of Part 1 of Division 2 of the Public Contract Code).*

26     ~~(4)~~

27     (5) *Nothing in paragraph (2) shall preclude a school district*  
28 *from segregating the request for proposals into a request for*  
29 *qualifications, followed by a request for proposals with price*  
30 *information from the proposers deemed most qualified by the*  
31 *school district, provided that the procedures specified in paragraphs*  
32 *(2) and (3) (2), (3), and (4) are otherwise followed.*

33     (b) *Notwithstanding Sections 17297 and 17402, a school district*  
34 *may enter into an instrument created pursuant to paragraph (1) of*  
35 *subdivision (a) before written approval by the Department of*  
36 *General Services' Division of the State Architect if the instrument*  
37 *provides that no work for which a contractor is required to be*  
38 *licensed in accordance with Article 5 (commencing with Section*  
39 *7065) of Chapter 9 of Division 3 of the Business and Professions*  
40 *Code and for which Division of the State Architect approval is*

1 required shall be performed before receipt of the required Division  
2 of the State Architect approval.

3 (c) A rental of property that complies with subdivision (a) as it  
4 reads on the day that the lease is entered into shall be deemed to  
5 have thereby required the payment of adequate consideration for  
6 purposes of Section 6 of Article XVI of the California Constitution.

7 (d) (1) This subdivision shall apply retroactively to a project  
8 for the construction, alteration, repair, or improvement of any  
9 structure, building, or other improvement of any kind that was  
10 leased through an instrument pursuant to this section before July  
11 1, 2015. If at any time the instrument is determined to be invalid  
12 by a court of competent jurisdiction, the contractor who entered  
13 into the instrument with the school district shall be entitled to be  
14 paid the reasonable cost of the labor, equipment, materials, and  
15 services furnished by the contractor before the date of the  
16 determination that the instrument is invalid if all of the following  
17 conditions are met:

18 (A) The contractor proceeded with construction, alteration,  
19 repair, or improvement based upon a good faith belief that the  
20 instrument was valid.

21 (B) The school district has reasonably determined that the work  
22 performed is satisfactory.

23 (C) Contractor fraud did not occur in the obtaining or  
24 performance of the instrument.

25 (D) The instrument does not otherwise violate state law related  
26 to the construction or leasing of public works of improvement.

27 (2) In no event shall payment to the contractor pursuant to this  
28 section exceed either of the following:

29 (A) The contractor's costs as included in the instrument plus  
30 the cost of any approved change orders.

31 (B) The lease payments made, less profit, at the point in time  
32 the instrument is determined to be invalid by a court of competent  
33 jurisdiction.

34 (3) Notwithstanding paragraph (1), this subdivision shall not  
35 affect any protest and legal proceedings, whether contractual,  
36 administrative, or judicial, to challenge the award of the public  
37 works contract, nor affect any rights under Section 337.1 or 337.15  
38 of the Code of Civil Procedure.



1 ~~(e) This section shall remain in effect only until July 1, 2022,~~  
2 ~~and as of January 1, 2023, is repealed, unless a later enacted statute,~~  
3 ~~that is enacted before January 1, 2023, deletes or extends that date.~~

4 *(e) This section shall become inoperative on July 1, 2022, and,*  
5 *as of January 1, 2023, is repealed, unless a later enacted statute,*  
6 *that becomes operative on or before January 1, 2023, deletes or*  
7 *extends the dates on which it becomes inoperative and is repealed.*

8 SEC. 3. Section 17406 of the Education Code, as added by  
9 Section 2 of Chapter 408 of the Statutes of 2014, is amended to  
10 read:

11 17406. (a) Notwithstanding Section 17417, the governing  
12 board of a school district may let, for a minimum rental of one  
13 dollar (\$1) a year, to any person, firm, or corporation any real  
14 property that belongs to the school district if the instrument by  
15 which this property is let requires the lessee to construct on the  
16 demised premises, or provide for the construction thereon of, a  
17 building or buildings for the use of the school district during the  
18 term of the lease, and provides that title to that building shall vest  
19 in the school district at the expiration of that term. The instrument  
20 may provide for the means or methods by which that title shall  
21 vest in the school district before the expiration of that term, and  
22 shall contain other terms and conditions as the governing board  
23 of the school district may deem to be in the best interest of the  
24 school district.

25 (b) Any rental of property that complies with subdivision (a)  
26 shall be deemed to have thereby required the payment of adequate  
27 consideration for purposes of Section 6 of Article XVI of the  
28 California Constitution.

29 (c) This section shall become operative on July 1, 2022.